

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B5

FILE:

LIN-07-062-51599

Office: NEBRASKA SERVICE CENTER

Date: **MAR 18 2010**

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry concerning your case must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer retail and service firm. It seeks to employ the beneficiary permanently in the United States as an accounting manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief, and the petitioner's Assets and Liabilities statements for the four quarters of 2006 and tax return for 2007 as additional evidence.

The record shows that the appeal is properly and timely filed, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 Application for Permanent Employment Certification (ETA Form 9089), was accepted for processing by any office within the employment system of DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on November 16, 2006. The proffered wage as stated on the ETA Form 9089 is \$82,243.00 per year. On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have an establishment date in 2002, a gross annual income of \$249,461.18, a net income of \$54,709.05 and seven employees.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

In support of the petition, the petitioner submitted the beneficiary’s degree certificates, experience letters from the beneficiary’s current and former employers, the petitioner’s Texas Sales and Use Tax Returns, Texas Property Tax Statements, bank statements and financial statements as of October 31, 2006.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date, on August 7, 2007, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for the petitioner for 2006, 2007 financial statements as of July 31, 2007, and bank statements covering a period from January to July 2007. The record also contains the petitioner’s 2007 financial statements as of October 31, 2007 submitted with the motion to reopen/reconsider the petition.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2006 thereafter.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner’s federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

for determining a petitioner's ability to pay the proffered wage. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). See also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner's tax returns in the record reflect the following information for the following years:

	2006	2007
Net income	\$4,320	\$50,688
Current Assets	\$27,652	\$39,863
Current Liabilities	\$1,167	\$1,705
Net current assets	\$26,485	\$38,158

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 22, 2007, denied the petition.

On appeal, counsel asserts the evidence submitted by the petitioner has established the petitioner's ability to pay the proffered wage as of the priority date. Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Counsel advocates combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

Counsel submitted several financial statements as evidence to demonstrate the petitioner's ability to pay the proffered wage in this case. Although counsel indicates they are audited, these financial statements are either without accountant's reports or the accountant's reports clearly state that financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

In addition, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions, including I-129 nonimmigrant petitions. In the instant case, the petitioner has seven I-129 non-immigrant petitions for temporary workers approved³ for which the petitioner is obligated to pay two H-1B employees at the level of \$27,000 per year and one at the level of \$28,000 per year in 2006, and two at \$27,000 and one at \$42,000. The petitioner would need to demonstrate \$82,000 was available in 2006 and \$96,000 in 2007 to pay its H-1B employees, however, the tax returns show that the petitioner paid total wages of \$56,160 in 2006 and \$63,360 in

³ USCIS records show that the petitioner had/has at least seven H-1B employees with the following approved Form I-129 nonimmigrant petitions:

- SRC-02-155-50053 filed on April 22, 2003 and approved for a period from June 4, 2002 to April 30, 2005 at the prevailing wage of \$30,000 per year.
- SRC-04-001-52938 filed on October 1, 2003 and approved for a period from October 10, 2003 to October 10, 2006 at the prevailing wage of \$27,000; subsequent I-129 nonimmigrant petitions WAC-06-254-52660, WAC-07-062-53233 and EAC-08-120-50908 were also approved on behalf of the same beneficiary at the prevailing wage of \$27,000 for periods from October 11, 2006 to January 4, 2007 and from January 5, 2007 to January 4, 2008, and at the prevailing wage of \$39,000 for a period from March 11, 2008 to January 4, 2011, respectively.
- SRC-04-001-53617 filed on October 1, 2003 and approved for a period from October 15, 2003 to October 15, 2006 at the prevailing wage of \$28,000.
- SRC-04-081-50564 filed on January 26, 2004 and approved for a period from February 1, 2004 to January 31, 2007 at the prevailing wage of \$27,000.
- EAC-07-135-52649 filed on April 3, 2007 and approved for a period from October 1, 2007 to September 30, 2010 at the prevailing wage of \$42,000.
- EAC-08-140-51112 filed on April 14, 2008 and approved for a period from October 1, 2008 to September 30, 2011 at the prevailing wage of \$42,000.
- EAC-09-137-53352 filed on April 7, 2009 and approved for a period from October 1, 2009 to September 30, 2012 at the prevailing wage of \$42,000.

2007. Therefore, the petitioner not only failed to demonstrate that it had sufficient net income or net current assets to pay the instant beneficiary the proffered wage in 2006 and 2007, but also failed to pay its H1B employees the prevailing wages.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the year of the priority date and subsequent years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.